86-1061

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

THE TRIBUNE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE PUBLIC HAS A RIGHT OF ACCESS UNDER THE FIRST AMENDMENT AND COMMON LAW TO A BILL OF PARTICULARS LISTING UNINDICTED CO-CONSPIRATORS PROVIDED UNDER COURT ORDER IN A CRIMINAL CASE

The Eleventh Circuit erred in equating a bill of particulars naming unindicted co-conspirators with voluntary civil discovery over which there is no presumptive right of access. Binding precedent of this Court establishes a qualified constitutional and common law right of access to criminal proceedings and documents that can be denied only by undertaking a proper balancing of interests. Press-Enterprise Co. v. Superior Court of California, 478 U.S. ____, 92 L. Ed. 2d 1 (1986); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984).

INTERESTED PARTIES

The following persons were parties below and have an interest in the outcome of this case:

The United States of America
Fred Arthur Anderson
Jospeh Henry Kotvas, Jr.
The Tribune Company
Claude Tanner
Suburban Disposal Service, Inc.
Cullen H. Williams
Alafia Land Development Corporation, Inc.

STATEMENT OF PARENT, SUBSIDIARY, AND AFFILIATE CORPORATIONS

Pursuant to Supreme Court Rule 28.1, the Tribune Company submits the following list naming all of its parent, subsidiary, and affiliated corporations:

Media General, Inc.
(parent corporation)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY

OPINIONS BELOW

Petitioner seeks review of the opinion of the Eleventh Circuit Court of Appeals in this case reported as United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986). That opinion appears in the appendix to this petition at A-10.[1] The decision of the United States District Court for the Middle District of Florida, affirmed by the Eleventh Circuit, was not reported and appears in the appendix at A-5.

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[1] Citations to the attached appendix are designed as "A-__."

JURISDICTIONAL GROUNDS

Pursuant to 28 U.S.C. § 1254(1), petitioner The Tribune Company files this petition for writ of certiorari to the Eleventh Circuit Court of Appeals seeking review of the Court's September 4, 1986 decision denying The Tribune Company's request for access to a bill of particulars naming unindicted co-conspirators. The Tribune Company's timely petition for rehearing or for rehearing en banc was denied on October 27, 1986, and the Eleventh Circuit's mandate issued on November 4, 1986.

The Eleventh Circuit's opinion denies public access to a court-ordered bill of particulars naming unindicted co-conspirators by equating the information provided in the bill with civil discovery and by failing to recognize either a First Amendment right of access or a common law presumption of openness to such court

documents. This decision ignores applicable access decisions of this Court and expressly conflicts with the Third Circuit's opinion in United States v. Smith, 776 F.2d 1104 (3d Cir. 1985), where the court found that the First Amendment right of access extends to bills of particulars under the historical and structural analysis mandated by decisions of this Court. Petitioner The Tribune Company files this petition for writ of certiorari seeking resolution of the conflict created by the Eleventh Circuit's erroneous and unwarranted decision in this case below.

STATEMENT OF THE CASE AND FACTS

This case is before the Court on facts taken from the panel decision. On May 23, 1985, a federal grand jury in the Middle District of Florida returned a forty-five count indictment against thirty defendants. The indictment alleged that the Board of County Commissioners of Hillsborough County had been operated as a corrupt enterprise within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982). The indictment named several unindicted persons as participants in the enterprise, but also referred to several unnamed, unindicted participants. Most of the thirty defendants filed motions for a bill of particulars seeking the identity of the unnamed, unindicted participants. These motions were granted by a magistrate and the Government did not appeal the ruling.

The government complied with the magistrate's order by filing a bill of particulars, but simultaneously sought to seal the bill by ex parte in camera motion. The district court granted the government's motion to prevent stigmatization of the "unindicated co-conspirators." At that point, nothing in the public record reflected the filing of the bill, the government's motion to seal, or the district court's closure order. Thereafter, suspecting that the district court's file in regard to the requests for a bill of particulars had been sealed, The Tribune Company filed a petition for access, requesting inter alia, copies of motions relating to the production of the bill of particulars and copies of any orders issued by the court limiting public access to the bill of particulars.

The district court at that point granted The Tribune's petition for access, released the in camera orders sealing the bill of particulars, and reaffirmed its decision to seal the court documents. The Tribune thereafter filed a second petition for access, seeking release of the bill of particulars, again arguing that the prior precedents of this Court established an unquestionable right of access under the First Amendment to judicial documents. The district court denied The Tribune's request for a hearing and once again declined to unseal the closed documents, concluding that the potential harm to the unindicated co-conspirators outweighed the public's interest in obtaining the information at issue.[2] The Eleventh Circuit

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[2] The district court had jurisdiction over the underlying criminal case out of which this controversy arose pursuant to 18 U.S.C. § 3231.

affirmed on appeal, A-10. United States v. Anderson, 799 F.2d 1438 (11th Cir. 1986).

ARGUMENT AND AUTHORITIES

THE PUBLIC HAS A RIGHT OF ACCESS UNDER THE FIRST AMENDMENT AND COMMON LAW TO A BILL OF PARTICULARS LISTING UNINDICTED CO-CONSPIRATORS PROVIDED IN A CRIMINAL CASE.

1. The Eleventh Circuit's Decision Ignores Prior Right of Access Decisions of This Court.

The issue presented in this case cuts to the very core of access decisions in criminal context--whether the public has a right of access protected under the First Amendment or common law to a court document, a bill of particulars, that was provided by the prosecution in a criminal case to the defendants pursuant to a court order. Prior decisions of this Court unquestionably establish that the constitutional right of access to judicial proceedings also applies to court documents. See, e.g., Press Enterprise Company v. Superior Court of California,

464 U.S. 501 (1984) (voir dire transcripts) (Press-Enterprise I). As recently as last term in Press-Enterprise Company v. Superior Court of California, 478 U.S. ____, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II), this Court once again adhered to these precepts and affixed a qualified First Amendment right of access to transcripts of preliminary probable cause hearings in criminal cases.

The Eleventh Circuit in the instant case inexplicably eschewed the First Amendment analysis mandated by these cases in favor of superficial analysis equating bill of particulars provided pursuant to court order in a criminal case with voluntary civil discovery. The court recognized that a bill of particulars, properly used, supplements an indictment by furnishing a defendant with information "necessary" for trial and that such bills are not appropriate for "generalized

discovery." 799 F.2d at 1441. The Court rightly observed that to allow the bill of particulars to serve as a "wholesale discovery device" would frustrate the directives of Federal Rule of Criminal Procedure 16(b)(2), which specifically disavows discovery of statements made by governmental witnesses. Id. at 1442. From these propositions, the lower court springboarded to the conclusion that it would "decline to apply a mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment" and, therefore, the court determined that "[a] request for a list of 'unindicted co-conspirators,' so called, is a discovery request that is not a matter of public record and cannot be made a matter of public record by simply attaching to it the label 'bill of particulars.'" Id. at 1442.

Aside from the fact that the Eleventh Circuit's decision is premised upon the unfounded assumption that the bill of particulars was improperly used in this case,[3] that decision exhibits an amazing lack of deference to the precedent of this court. The panel decision totally fails to address this Court's expanding recognition of a First Amendment right of public access to criminal proceedings and the matters associated therewith. In Richmond Newspa-

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[3] Contrary to the intimations of the panel decision, the propriety of the order granting the motion for bill of particulars is not an issue here. The Government at no point in the district court objected to filing the bill, and did not appeal the order directing entry of the same. Nor was there any evidence of governmental overreaching in the formulation of the list of unindicted co-conspirators set forth in the bill. The order granting the bill should be cloaked with the ordinary presumption of correctness accorded any unappealed order, and in determining whether there is a constitutional or common law right of access to the documents in question, the panel was obligated to accept the correctness of that order as a given.

pers, Inc. v. Virginia, 448 U.S. 555 (1980), although lacking a majority opinion, this Court clearly entrenched a right to open criminal trials within the ambit of the First Amendment. Two years later, in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), a solid majority of the court affirmed the right to open public access of criminal proceedings recognizing "the institutional value of the open trial . . . in both logic and experience." Id. at 606. In Press-Enterprise I, 464 U.S. 501 (1984), the Court extended the constitutional right of access to transcripts of the voir dire examination in a criminal trial.

Most recently, in Press-Enterprise II, 478 U.S. ____, 92 L. Ed 2d 1 (1986), this Court revisited the First Amendment analysis developed in Richmond Newspapers, Globe Newspaper, and Press-Enterprise I in the context of access to transcripts of pre-trial probable cause hearings. In recognizing protection under the First

Amendment, the Court again set forth the two step analytical framework for determining whether a constitutional presumption of openness attaches under the circumstances at issue: First, the court considers "whether the place and process has historically been open to the press and general public." Second, the court considers "whether public access plays a significant positive role in the functioning of the particular process in question." 92 L. Ed. 2d at 10. If these tests of "experience and logic" are satisfied, a presumption of openness attaches under the First Amendment that "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Id. at 11, quoting, Press-Enterprise I, 464 U.S. at 510.

The Eleventh Circuit in this case not only failed to undertake such analysis, first set forth by Justice Brennan in his concurrence in Richmond Newspapers, 448 U.S. 59 (Brennan, J., concurring), but instead perfunctorily equated the bill of particulars with a non-discoverable civil document apparently relying upon reasoning such as found in Seattle-Times Co. v. Rhinehart, 467 U.S. 20 (1984).[4] Although

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[4] The Eleventh Circuit found that "a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view." 799 F.2d at 1442 (footnote omitted). The Eleventh Circuit's opinion, however, recognizes that bills of particulars even under binding authority in that circuit, see Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc), simply are not to be used for discovery purposes and are used to provide defendants with necessary information for trial. See, e.g., United States v. Diecidue, 603 F.2d 535 (5th Cir.). cert. denied, 445 U.S. 946 (1979); United States v. Martino, 648 F.2d 367 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Whether or not a bill has been properly used should not affect the presumption (footnote cont)

the Seattle-Times Court found that a litigant has no constitutional right of access to discovery information made available for trying his suit, that case clearly dealt with discovery in the civil context which historically has transpired in private and which often results in the disclosure of matters that will never be touched at trial. See id. at 26-27.

Such reasoning simply is inapplicable to matters disclosed pursuant to a court-ordered bill of particulars in the criminal context. In United States v. Smith, 776 F.2d 1103 (3d Cir. 1985), the Third Circuit specifically disavowed any

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*(cont) of access to that document; rather, it should affect the ultimate balancing as to whether the harm outweighs the benefits stemming from that access, as observed by the court in Smith. See infra note 5. At any rate, the Eleventh Circuit's analogy to voluntary civil discovery is inapplicable to this case. The bill of particulars filed here was provided by the prosecution pursuant to a Court order, and, therefore, the bill could in no way be described as analogous to "voluntary" discovery.

connection between Seattle-Times and analysis of a request for access to a bill of particulars naming unindicted co-conspirators in a criminal prosecution involving public corruption. The Smith Court undertook an extensive historic and functional analysis of bills of particulars as required by Press Enterprise II, and concluded that these bills are designed to define and limit the government's case from which there can be no variance in the evidence at trial. In sum, the Smith Court concluded that "because bills of particular thus set the parameters of the government's case, we think public access to them serves the same societal interests served by access to the charging documents." Id. at 1111. The Court therefore found a presumption of access under the First Amendment, applicable to bills of particular, naming unindicted

co-conspirators. Id.[5] Consistent with Smith, other circuits have uniformly found a First Amendment right of access extending to pretrial documents in criminal proceedings. See In re Globe Newspaper

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[5] In Smith, the Third Circuit went on to find that the compelling privacy interests of the individuals involved outweighed the public's interest in free access. There, however, the bill came at the outset of the grand jury's investigation and included not only unindicated co-conspirators, but also those who "could conceivably be considered" as unindicated co-conspirators. The Government used this language because its investigations into the conduct of the unindicated co-conspirators had not yet been completed. In the instant case, there was no evidence of such governmental overreaching. The bill set forth those unindicted co-conspirators uncovered in a grand jury investigation that took over three years to complete. The determination of whether Smith and the instant case are in fact distinguishable cannot be made on this record, however, because no hearing was ever held to determine and weigh the competing interests of access versus closure. The significant point here is that the Smith court found both a constitutional and common law basis for access, requiring a showing of compelling interest before denying that access. 776 F.2d at 1112.

Co., 729 F.2d 47 (1st Cir. 1984) (pretrial proceedings setting bail and documents on which bail decisions are made); Associated Press v. United States District Court, 705 F.2d 1143 (9th Cir. 1983) (general First Amendment right to pretrial documents).

The Eleventh Circuit in this case not only failed to recognize the significant First Amendment considerations accompanying its decision,[6] but wholly ignored the common law right of access recognized by this court in Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). Justice Powell, speaking for the majority in Nixon, indicated that "It is clear that the courts of this county recognize a general right to inspect and copy public

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[6] The court below also dismissed Smith in a terse footnote stating that it was "not persuaded" that the authority relied upon by the Third Circuit compelled the conclusion by the court.

records and documents, including judicial records and documents." Id. at 597. This common law right does not vary appreciably from its constitutionally-based counterpart, as both require demonstration of some significant interest outweighing access prior to closure. Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983); United States v. Criden, 648 F.2d 814 (3d Cir. 1981).

Despite these clear constitutional and common law foundations for a presumption of access, the Eleventh Circuit here essentially created not only a presumption of non-access, but a presumption of non-access that ordinarily will be unassailable. The court first eschewed any balancing of interests and then compounded this fatal error by upholding the district court's decision to seal the record without a hearing, or without even a record indicating that a

document had been sealed. The net result of this decision is to approve a procedure whereby closure of documents is both presumed and secret, unless the closure order is somehow discovered through fortuitous circumstances.

The precedent of this Court establishes that the public's right of access to criminal proceedings and matters related thereto should be presumed and jealously guarded, unless some overwhelming necessity overshadows that public right. The Eleventh Circuit in this case emasculated these principles in favor of a simplistic analogy to civil discovery that is neither warranted nor analytically sound. The court's decision irreconcilably conflicts with Richmond Newspapers and its progeny and should be reversed.

2. This Court Should Resolve The Analytic Framework Applicable To Access For Documents In Criminal Cases.

The permutations flowing from the Eleventh Circuit's opinion in this case extend far beyond the factual parameters of this conflict, and even beyond the effects of having a published decision that is flatly incorrect. The Eleventh Circuit in this case adopted a mode of access analysis that effectively slams the courthouse door shut as to documents in criminal cases regardless of whether the circumstances of a particular case may call for closure. The Court's approach of equating bills of particulars with voluntary civil discovery constitutes a significant and dangerous step towards

clouding the conceptual significance attached to access in criminal cases.[7]

While some aspects of the civil process traditionally have been closed, see Seattle-Times, 467 U.S. at 33-34; Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring), post-grand jury criminal processes presumptively have been open, and must remain so, for the American Criminal justice system to continue to operate with

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[7] Petitioner would urge that a presumption of access should adhere in both the civil and criminal contexts. See, e.g., Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984). But because of the historical and systemic value of openness to the criminal justice system, this Court has recognized "a right of access to criminal trials in particular" under the First Amendment. Globe Newspaper, 457 U.S. at 605 (emphasis in original). One would expect, therefore, that the standard for closure in criminal cases would be even more stringent than in civil cases.

the support and respect of the public it serves.

Most criminal prosecutions in the United States are resolved prior to trial. See Gannett, 443 U.S. at 397 (Burger, C.J., concurring) (85% of criminal charges are resolved by guilty pleas); Annual Report of the Director of the Administrative Office of the United States Courts, 1985, at 384 (12.8% of federal criminal cases proceed to trial). In the vast majority of instances, therefore, the public and press can monitor the criminal process only through the availability of pretrial documents and access to pretrial proceedings. The public's only source of information regarding who will (or will not) be charged with a criminal violation or what the nature and extent of claims to be levied by the prosecution will be comes from the charging documents and other documents setting the parameters of the

trial filed prior to trial. Open access serves "as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality," and "enhance[s] the performance of all involved." United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) (citing Richmond Newspapers). See also Nebraska Press Association v. Stuart, 427 U.S. 539, 559-60 (1976); Waller v. Georgia, 467 U.S. 46 (1984). These functions simply cannot be served in a criminal justice system that fails to provide access to documents forming the very foundation of any prosecution.

Decisions of this court up to this point have addressed public access in the criminal context relating to pretrial court proceedings and documents directly relating to those in-court proceedings. See, e.g., Press-Enterprise I, 464 U.S.

501 (1984) (voir dire transcripts); Press-Enterprise II, 478 U.S. ____, 92 L. Ed. 2d 1 (1986) (preliminary hearing transcripts). This case provides this Court with an opportunity to set the standards governing public access to documents in criminal cases, where those documents are not directly emanating from some pretrial hearing that itself ordinarily has attached a presumption of openness. In so doing, the Court would resolve an inter-circuit conflict between the Third Circuit in Smith and the Eleventh Cirucit in this case, and would provide guidance on an issue of utmost importance to the functioning of the judicial process and the government as a whole.

CONCLUSION

The Eleventh Circuit's opinion below directly conflicts with decisions of this Court expressly recognizing a presumption of openness as to criminal proceedings and related documents under both the First Amendment and common law. By that holding, the Eleventh Circuit created a conflict with the Third Circuit which previously held that bills of particulars naming unindicted co-conspirators are subject to a qualified First Amendment privilege of access. Petitioner The Tribune Company urges that the Eleventh Circuit erred in its holding below, and respectfully requests that this Court issue a petition for writ of certiorari and review the judgment and opinion of the Eleventh Circuit Court of Appeals in this case.

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APPENDIX

INDEX TO APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs. Case No. 85-59-Cr-T-13

FRED ARTHUR ANDERSON, et al.

_____/

O R D E R

This cause comes before the Court on the petition for access filed by the Tribune Co. The petition is GRANTED.

On August 23, 1985, the Honorable Thomas G. Wilson, United States Magistrate, Ordered the government to file a bill of particulars listing, inter alia, the unindicted co-conspirators in this case. The government then filed a motion for a Court Order sealing the information. This Court granted the motion on September 18, 1985, and Ordered the Clerk of the Court to seal the bill of particulars.

The government also sought a Court Order sealing any similar act evidence it may offer at trial pursuant to Fed.R.Evid. 404(b). In an Order dated October 31, 1985, the Court granted the motion and directed the Clerk of the Court to seal the similar act evidence.

The Tribune Co., which publishes the Tampa Tribune, has filed the instant petition seeking access to the government's motions to seal the information noted above, transcripts and notices of any hearings, and Court Orders limiting access to documents in this case. The Tribune cites Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983) in which the Court held that there is a common law right of access to documents in court cases. The Newman Court established a balancing test to determine whether the administration of justice outweighs the

presumption in favor of access to judicial records.

The Court has already considered the factors which weigh in favor of sealing the list of unindicted co-conspirators and similar act evidence. That reasoning is detailed in the Court's Orders of September 18 and September 31, 1985. Accordingly, the Court hereby Orders the Clerk of the Court to unseal the Orders of September 18 and October 31, 1985. The government's motions on which the Orders are based will remain sealed as they reveal in part the sealed information and thus releasing the motions would frustrate the Court's Order. No hearing was held and thus there were no notices or transcripts. The bill of particulars and the similar act evidence are to remain sealed until further Order of the Court.

The Tribune Co. contends that Newman requires that the Court hold a hearing so

that the media may express its view. As the Court is granting the petition for access, the request for a hearing is moot.

DONE AND ORDERED in Chambers at Tampa, Florida, this 20th day of November, 1985.

/s/ George C. Carr
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs. Case No. 85-59-Cr-T-13

FRED ARTHUR ANDERSON, et al.

_____/

O R D E R

This cause comes before the Court on the petition for access filed by the Tribune Company, publisher of the Tampa Tribune. The petition is DENIED.

The petition was filed in response to the Court's Orders of September 18 and October 31, 1985, sealing the government's list of unindicted co-conspirators and any similar act evidence it may use at trial pursuant to Fed.R.Evid. 404(b). The Orders sealing the information were based on the Fifth Circuit Court of Appeals' reasoning in United States v. Briggs, 514 F.2d 794 (5th Cir. 1975). In Briggs, the

Court noted that being named as an unindicted co-conspirator stigmatizes an individual without providing a forum for vindication. It also deprives the unindicted co-conspirator of the right to participate in the trial, confront his accusers and cross-examine witnesses. The unindicted co-conspirator cannot be acquitted and an acquittal of the named defendants does not vindicate his reputation nor prevent him from prosecution in the future.

In its petition, the Tribune Company contends that Briggs is not applicable to the instant case. The Tribune notes that the Briggs Court differentiated between an unindicted co-conspirator named in the indictment and one named by the prosecutor in a bill of particulars in that the latter "does not carry the imprimatur of credibility that official grand jury action does." Id. at 805. However, the

Tribune does not add that in the following sentence the Fifth Circuit suggests that the "public impact" of a bill of particulars naming unindicted co-conspirators "may be tempered by protective orders." Id.

The Briggs Court established a balancing test, weighing the harm to the individual against the government's interest. As in Briggs, the harm to the individuals named as unindicted co-conspirators is great. Though branded as criminals, they will not be afforded an opportunity to clear their names even though the allegations may be baseless. The prosecutor's bill of particulars may not carry the same "imprimatur of credibility" as the grand jury but the accusation leaves the same mark on the individuals' reputations. Here, the harm to the individuals outweighs the public's interest in learning this information

before the trial. Much, if not all, of the information will be revealed when the defendants are tried. Thus, the Court need not reach the question of whether the harm to the individuals outweighs the public's interest in ever learning the identity of the unindicted co-conspirators. Rather, the public's right to the information is merely being delayed rather than denied.

The Court believes that the Briggs reasoning also applies to the similar act evidence. Like the list of unindicted co-conspirators, the notice of similar act evidence names individuals who allegedly participated in bribery but who were not named in the indictment. Those individuals face the same threat to their rights as the unindicted co-conspirators.

Accordingly, the Tribune Company's petition for access is DENIED.

DONE AND ORDERED in Chambers at Tampa, Florida, this 8th day of January, 1986.

/s/ George C. Carr
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED ANDERSON, ET AL.,

Defendants,

THE TRIBUNE COMPANY,

Petitioner-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(September 4, 1986)

Before TJOFLAT and KRAVITCH, Circuit Judges, and DUMBAULD*, Senior District Judge.

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*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

TJOFLAT, Circuit Judge:

I.

On May 23, 1985, a federal grand jury in the Middle District of Florida returned a forty-five count, 166-page indictment against thirty defendants. The indictment charged that the Board of County Commissioners of Hillsborough County, Florida was an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982), and that the defendants, who included three county commissioners and various construction contractors, real estate developers, suppliers, and lawyers, conspired to conduct and did conduct the affairs of the board through a pattern of bribery. In essence, the indictment alleged that a significant portion of local government in Hillsborough County had been corrupted.

Although the indictment named several participants in the acts of bribery who were not indicted, it also made references to participants who were neither indicted nor named. Most of the defendants filed motions for a bill of particulars that would identify those unnamed and unindicted participants, and some of the defendants also filed motions for pretrial notice of the Government's intention to use "similar act" evidence under Fed. R. Evid. 404(b). Those motions were granted by a magistrate.

In compliance with the magistrate's order, the Government filed a bill of particulars and a notice of possible similar acts evidence, but at the same time made in camera ex parte motions to seal the two documents. The motions to seal were granted by the district court, which, relying primarily on United States v. Briggs, 514 F.2d 794 (5th Cir. 1975),[1]

found that the publication of the names and possible similar acts evidence might stigmatize the "unindicted co-conspirators" as criminals without the opportunity for vindication.

The bill of particulars and the notice of similar acts evidence filed by the Government never appeared on the court's docket. The motions to seal and the district court's orders sealing those documents also did not appear on the court's docket. And no hearings were held to consider the motions to seal. In short, nothing in the public record indicated that any action had been taken relating to the magistrate's order compelling a bill of particulars and notice of similar acts evidence.

Only through the keen observation of a reporter for The Tampa Tribune did the paper's publisher, The Tribune Company (Tribune), suspect that certain documents

marked "in camera" delivered to the office of the clerk by the United States Attorney were the bill of particulars and notice of similar acts and that the court had sealed them. The Tribune then filed a petition for access requesting copies of (1) any motions or memorada filed seeking production of a bill of particulars in camera; (2) notices of hearing regarding the sealing of the bill of particulars; (3) transcripts of any hearing held to determine whether the bill was to be sealed; and (4) any orders issued by the court limiting public access to the bill of particulars or to other documents. The Tribune also requested a hearing on its petition.

The district court, finding a hearing to be unnecessary, granted the Tribune's petition for access and released two in camera orders in which the court had directed the sealing of the bill of par-

ticulars and the notice of similar acts evidence. The court noted that when it issued the orders it had considered the balancing test required by Newman v. Graddick, 696 F.2d 796 (11th Cir. 1983), and had determined that the factors in favor of sealing the court documents outweighed the presumption in favor of access to judicial records. The court, however, declined to reveal the Government's motions to seal, stating that "they reveal in part the sealed information and thus releasing the motions would frustrate the Court's Order."

Subsequently, the Tribune filed a second petition for access in which it sought the release of both the bill of particulars and the notice of similar acts evidence; it also renewed its request for the Government's motions to seal those documents and for a hearing. The Tribune argued that the public's constitutional

and common law rights to judicial documents outweighed the Government's interest in protecting the due process rights of unindicted participants. The district court denied the petition. Relying on the balancing test of United States v. Briggs, 514 F.2d 794 (5th Cir. 1975), the court found that both the harm to persons named in the bill of particulars as "unindicted co-conspirators" and the harm to individuals named in the notice of similar acts evidence outweighed "the public's interest in learning the information before trial."

The Tribune has appealed the district court's order.

II.

Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts may be admissible to prove, among other things, motive, opportunity, and intent. Although it is

obviously advantageous for defense counsel to determine before trial whether the prosecutor intends to offer similar acts evidence, the rule does not require the government to give notice of the intent to introduce such evidence. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[19] (1985). The absence of a mandatory notice requirement does not, however, preclude the prosecution from voluntarily giving notice of similar acts evidence. Id. Nor is the trial judge prevented from requiring disclosure of similar acts evidence in compliance with a pretrial Omnibus Hearing procedure consented to by the parties. See United States v. Jackson, 621 F.2d 216, 220 (5th Cir. 1980); see also 2 A.B.A., Standards for Criminal Justice ch.11 (2d ed. 1980); Clark, The Omnibus Hearing in State and Federal Courts, 59 Cornell L. Rev. 761 (1974). A defense motion for pretrial

notice of similar acts evidence is thus merely akin to a request for voluntary discovery.

In this case, when the Government filed the notice of possible similar acts evidence along with a motion to seal the document, it, in effect, had voluntarily agreed to provide the information on the condition that the defendants not reveal the notice's contents to the public or to the press. Simply because the Government filed the notice in compliance with a court order does not make the notice information something other than voluntary discovery.[2] The question then becomes whether the Tribune is entitled to view a discovered document describing possible similar acts evidence.

The Supreme Court has stated that the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the

public generally." Branzburg v. Hayes, 408 U.S. 665, 684, 92 S.Ct. 2646, 2658 (1972) (plurality) (citations omitted); see also Pell v. Procunier, 417 U.S. 817, 833-34, 94 S.Ct. 2800, 2810 (1974). Thus, the press' right of access to discovered material turns on the public's right of access.

Discovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press. See Seattle Times Co. v. Rhinehart, ___ U.S. ___, ___, 104 S.Ct. 2199, 2207-08 (1984) (Pretrial interrogatories and depositions "were not open to the public at common law"); Gannett Co. v. DePasquale, 443 U.S. 368, 396, 99 S.Ct. 2898, 2914 (1979) (Burger, C.J., concurring) ("[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than

wholly private to the litigants."). Moreover, documents collected during discovery are not "judicial records." Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private. Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 15 (1983).

If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is

undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge. Litigants should not be discouraged from putting their discovery agreements in writing, and district judges should not be discouraged from facilitating voluntary discovery.

Here, the district court, in denying the Tribune's petition for access to the government's notice of similar acts evidence, merely refused to allow the Tribune access to a document not a matter of public record. See United States v. Gurney, 558 F.2d 1202, 1208 (5th Cir. 1977), cert. denied, 435 U.S. 968, 98 S.Ct. 1606 (1978). It follows that the district court did not err when it sealed the notice or when it denied the public and the Tribune a hearing before the document was sealed.[3] We need not address the issue of whether a trial court must articulate reasons for denying access to

material that cannot be characterized as a court document and is not a matter of public record, because the judge in this case did articulate reasons for denial.

III.

The purpose of a true bill of particulars is threefold: "to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985) (citations omitted); see also 8 J. Moore, Moore's Federal Practice ¶ 7.06[1] (2d ed. 1986). A bill of particulars properly viewed, supplements an indictment by providing the defendant with information necessary for trial preparation. Generalized discovery, however, is not an appropriate function of

a bill of particulars and is not a proper purpose in seeking the bill. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981).

To allow the bill of particulars to serve as a wholesale discovery device would actually frustrate the federal discovery rule. Rule 16(b)(2) of the Federal Rules of Criminal Procedure states that the rule "does not authorize the discovery or inspection of . . . statements made . . . by government . . . witnesses, or by prospective government . . . witnesses." A defendant who desires a list of government witnesses--or "unindicted co-conspirators"--could thus bypass the Rule 16(b) restriction on discovery by asking for and receiving a "bill of particulars" pursuant to Fed. R. Crim. P. 7(f), which simply provides that "[t]he court may direct the filing of a bill of

particulars." Because a defendant has no right to obtain a list of witnesses by simply calling his request a "bill of particulars," see United States v. Pena, 542 F.2d 292, 294 (5th Cir. 1976), we decline to apply a mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment.[4]

Thus, for the reasons presented in our discussion of the notice of similar acts evidence, a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view.[5] A request for a list of "unindicted co-conspirators," so called, is a discovery request that is not a matter of public record and cannot be made a matter of public record by simply attaching to it the label "bill of particulars." The public and press are also not entitled to demand a hearing on

whether a "discovery bill" should be sealed. Finally, it should be noted that the district court's refusal to allow the Tribune to inspect the sealed notice of similar acts evidence and the sealed bill of particulars in no way restricted the Tribune from independently obtaining the information contained in the documents by employing its own investigative techniques.

The district court's order sealing the notice of similar acts evidence and the bill of particulars is, accordingly,

AFFIRMED.

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1. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

2. The defendants' motion for notice of similar acts evidence cannot be regarded properly as a Fed. R. Crim. P. 12 motion requesting discovery under Fed. R. Crim. P. 16, because similar acts evidence does not fall within the categories of information--such as documents and tangible objects--that the government must furnish upon the defendant's request.

3. "[I]t is unreasonable to require a district judge to hold hearings and to issue special orders with respect to every request he is presented with by the press during the course of a long trial." United States v. Gurney, 558 F.2d 1202, 1211 n.15 (5th Cir. 1977), cert. denied, 435 U.S. 968, 98 S.Ct. 1606 (1978).

4. We are aware that the Third Circuit, when interpreting Rule 7(f) of the Federal Rules of Criminal Procedure, recently found that bills of particulars "were regarded by the drafters of the rules as supplements to the indictment rather than as pretrial discovery." United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985) (footnote omitted). We are not persuaded, however, that Rule 7(f) compels that conclusion.

5. Simply because a bill of particulars may be "a proper procedure for discovering the names of unindicted coconspirators who the government plans to use as witnesses,"

United States v. Barrentine, 591 F.2d 1069, 1077 (5th Cir.), cert. denied, 444 U.S. 990, 100 S.Ct. 521 (1979), such a "discovery bill" is not entitled to the status of a public document, as is, for example, an indictment.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3034

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED ANDERSON, et al.,

Defendants,

THE TRIBUNE COMPANY,

Petitioner-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion September 4, 1986, 11 Cir., 198_, ___F.2d___).

(OCT 27 1986)

Before TJOFLAT and KRAVITCH, Circuit Judges, and DUMBAULD*, Senior District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

*Hon. Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3034

D.C. Docket Nos. 85-75-13 & 85-59-13

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRED ANDERSON, et al.,

Defendants,

THE TRIBUNE COMPANY,

Petitioner-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

Before TJOFLAT and KRAVITCH, Circuit Judges, and DUMBAULD*, Senior District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court ap-

pealed from, in this cause be and the same is hereby, AFFIRMED;

It is further ordered that petitioner-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Entered: September 4, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godrey
Deputy Clerk

ISSUED AS MANDATE:
Nov. 10, 1986

No. 86-1061

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE TRIBUNE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly sealed a bill of particulars that disclosed the names of unindicted co-conspirators.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rule:

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OCTOBER TERM, 1986

No. 86-1061

THE TRIBUNE COMPANY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A10-A27) is reported at 799 F.2d 1438.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1986. A petition for rehearing was denied on October 27, 1986. The petition for a writ of certiorari was filed on December 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 23, 1985, a grand jury in the United States District Court for the Middle District of Florida returned a 45-count indictment in *United States* v. *Fred A. Anderson,* No. 85-59-Cr-T-13, against 30 defendants. The indictment charged that the Board of County Commissioners for Hillsborough County, Florida, constituted an "enterprise" within the meaning of the Racketeer Influenced and Cor-

rupt Organizations Act, 18 U.S.C. 1961-1968. It also charged that the defendants, including three county commissioners and various construction contractors, real estate suppliers, lawyers, and others conspired to and did violate 18 U.S.C. 1962(c) by conducting the business of the Board of County Commissioners through a pattern of bribery. Pet. App. A11.

In describing the bribery scheme, the indictment referred to several known and unknown participants in the charged offenses who were neither indicted nor named (Pet. App. A12). After the return of the indictment, several of the named defendants filed motions for bills of particulars to obtain the names of the known but unnamed co-conspirators. On August 23, 1985, a magistrate granted the motions. *Ibid.*

The government responded by filing the requested bill of particulars along with an in camera, ex parte motion to seal the document. The district court granted the motion.[1] The court noted that "naming the unindicted co-conspirators stigmatizes them" and "may severely harm their reputations and deny them employment or other economic opportunities." C.A. Record Excerpts Tab 6, at 1. At the same time, the court explained that such individuals, unlike persons who are indicted, are not protected by a grand jury from unsupported accusations, have no opportunity to confront their accusers or argue their innocence at trial, and cannot be vindicated by acquittal. In light of these considerations, the court concluded that sealing the bill of particulars would be appropriate "[t]o avoid the stigma" that would follow from "publicly brand[ing]" the unindicted co-conspirators as

[1] The court also sealed the government's motion and the order granting the motion, and it did not note the entry of its order on the docket sheet (Pet. App. A12-A13). The court subsequently unsealed its order, but declined to unseal the motion because it "reveal[ed] in part the sealed information" (*id.* at A3).

"criminal[s] without the opportunity for vindication." *Id.* at 2. The court accordingly ordered defense counsel not to disclose the names of the unindicted co-conspirators to the press or the public pending further court order (*id.* at 3).

Petitioner, the publisher of The Tampa Tribune, then filed a petition for access, seeking release of the bill of particulars. The district court denied the petition, restating its earlier conclusions (Pet. App. A5-A9). Citing *United States* v. *Briggs,* 514 F.2d 794 (5th Cir. 1975), the court explained that petitioner's request should be judged under "a balancing test, weighing the harm to the individual against the government's interest." Here, the court found that "the harm to the individuals named as unindicted co-conspirators is great. Though branded as criminals, they will not be afforded an opportunity to clear their names even though the allegations may be baseless." This harm, the court concluded, "outweighs the public's interest in learning this information before the trial." Pet. App. A7-A8. The court added that much of the requested information likely would be revealed at trial (*id.* at A8).

2. The court of appeals affirmed the district court's denial of the petition for access, although on different grounds (Pet. App. A10-A27). The court reasoned that a "true bill of particulars" serves to "supplement[] an indictment by providing the defendant with information *necessary* for trial preparation. Generalized discovery, however, is not an appropriate function of a bill of particulars" (*id.* at A22-A23 (emphasis in original)). The court accordingly declined "to apply a mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment" (*id.* at A24 (footnote omitted)). In this case, the court concluded, the defendants' attempt to obtain the names of unindicted co-conspirators was, in essence, a "discovery request" (*ibid.*).

Having determined that the bill of particulars in this case served largely as a discovery device, the court held

that "a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view" (Pet. App. A24 (footnote omitted)). Citing this Court's decision in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), the court of appeals explained that "[d]iscovery is neither a public process nor typically a matter of public record" (Pet. App. A19). Thus, by denying the petition for access, the district court "merely refused to allow the Tribune access to a document not a matter of public record" (*id.* at A21). Such a document, the court concluded, "cannot be made a matter of public record by simply attaching to it the label 'bill of particulars' " (*id.* at A24).[2]

ARGUMENT

Petitioner contends that the decision below is in conflict with rulings of this Court recognizing First Amendment and common law rights of access to certain criminal proceedings and court documents. Petitioner's contention, however, disregards the narrow and essentially factual nature of the court of appeals' actual holding.

1. As petitioner notes, this Court has held that the press has a qualified First Amendment right of access to

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[2] Some of the defendants also filed motions for pretrial notice of the government's intention to use "similar acts" evidence under Fed. R. Evid. 404(b). While the district court granted the motions, it sealed the material produced by the government (C.A. Record Excerpts Tab 7, at 1-2). The district court subsequently declined to unseal the material, explaining that "[l]ike the list of unindicted co-conspirators, the notice of similar act evidence names individuals who allegedly participated in bribery but who were not named in the indictment" (Pet. App. A8). The court of appeals affirmed this decision, holding that the notice of similar act evidence was a discovery document that was not a matter of public record (*id.* at A21-A22). Petitioner has not challenged this aspect of the ruling below.

criminal proceedings when two conditions are met: when the proceeding involved "has historically been open to the press and general public," and when "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.* v. *Superior Court,* No. 84-1560 (June 30, 1986) (*Press-Enterprise II*), slip op. 6. Applying this principle, the Court has found such a right of access to pretrial hearings (see *ibid.*), to the voir dire (see *Press-Enterprise Co.* v. *Superior Court,* 464 U.S. 501, 505 (1984) (*Press-Enterprise I*)), to trial (see *Globe Newspaper Co.* v. *Superior Court,* 457 U.S. 596 (1982)), and to transcripts of those proceedings. Similarly, the Court has held that the public has a qualified common law right to inspect and copy judicial records. *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 597 (1978). See *United States* v. *Beckham,* 789 F.2d 401, 409-410 (6th Cir. 1986); *United States* v. *Rosenthal,* 763 F.2d 1291, 1294-1295 (11th Cir. 1985).

Petitioner contends that the decision below disregarded both of those rights (Pet. 8-9, 18-19). In fact, however, the court of appeals applied the principles set out in this Court's decisions, basing its holding on a conclusion that the bill of particulars in this case simply is not a court record of the sort that traditionally has been available for inspection by the public. In contrast to bills of particulars that supplement an indictment by providing information that is essential for trial preparation—and that *are* public documents (see Pet. App. A27 n.5)—the court found that the bill here "merely facilitate[d] voluntary discovery" (*id.* at A24). Such a document, the court correctly concluded, never has been held available to the public or the press.

As this Court explained in *Seattle Times Co.* v. *Rhinehart,* 467 U.S. 20, 32 (1984), even a litigant "has no First Amendment right of access to information made available for purposes of trying his suit." See *id.* at 33.

While *Seattle Times* involved civil proceedings, criminal discovery is, in general, no less private. Even petitioner does not suggest that there is a First Amendment or common law right of access to criminal discovery materials. The court of appeals' finding that the defendants' motion for a bill of particulars amounted to "a discovery request" (Pet. App. A24) accordingly disposes of this case.

2. Petitioner contends (Pet. 15-16) that the court of appeals' treatment of the bill of particulars here cannot be reconciled with *United States* v. *Smith,* 776 F.2d 1104 (3d Cir. 1985). In *Smith,* the Third Circuit, like the court below, addressed a request to unseal a bill of particulars that listed the names of unindicted co-conspirators. In that decision, the Third Circuit concluded that First Amendment and common law rights of access generally attach to bills of particulars because such bills are "more properly regarded as supplements to the indictment than as the equivalent of civil discovery." 776 F.2d at 1111.

The analysis used below and that applied in *Smith* are not squarely in conflict, however. The court below, like the Third Circuit in *Smith,* concluded both that indictments are public records (see Pet. App. A27 n.5; 776 F.2d at 1111-1112) and that true bills of particulars "supplement[] an indictment" (Pet. App. A22; see 776 F.2d at 1111). But the court below went a step further, "declin[ing] to apply a mechanical rule whereby a bill of particulars is *automatically* accorded the status of a supplement to an indictment" (Pet. App. A24 (emphasis added; footnote omitted)). Instead, the court held that "a bill of particulars that merely facilitates voluntary discovery is not a court document the public and press are entitled to view" (*ibid.* (footnote omitted)). The Third Circuit has not yet specifically addressed the question whether this small subset of bills of particulars should be treated as

public records; until it does, consideration of the issue by this Court would be premature.[3]

In any event, whatever the tension between the analysis used below and the discussion in *Smith*, it is plain that petitioner's request for access would fail even in the Third Circuit. While the *Smith* court found that First Amendment and common law rights of access to the bill of particulars at issue there could be *asserted*, the Third Circuit in fact declined to unseal the bill because it concluded—under both the First Amendment and common law tests—that privacy interests outweighed the public interest in disclosure. On the basis of district court findings that are virtually identical to those in this case (compare 776 F.2d at 1106-1107, with C.A. Record Excerpts Tab 6, at 1-3 and Pet. App. A5-A9), the Third Circuit had "no hesitancy in holding" that the risk of reputational injury to the unindicted co-conspirators justified nondisclosure of the bill (776 F.2d at 1114). Indeed, the concurring judge in *Smith* characterized the Third Circuit's opinion as suggesting "that whenever an unindicted co-conspirator is threatened with serious injury to reputation or career, the sealing of the offending bill of particulars is warranted" (*id.* at 1115 (Mansmann, J., concurring)). Because petitioner accordingly would not be entitled to access to the bill of particulars in this case under any theory, further review is not warranted.

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[3] Despite petitioner's contentions to the contrary (Pet. 11 & n.3), the court of appeals did not specifically disapprove the district court's decision to grant the motion for a bill of particulars. While the court of appeals stated that "[g]eneralized discovery * * * is not an appropriate function of a bill of particulars" (Pet. App. A22-A23), it recognized that "a bill of particulars may be 'a proper procedure for discovering the names of unindicted coconspirators' " (*id.* at A26 n.5 (quoting *United States* v. *Barrentine*, 591 F.2d 1069, 1077 (5th Cir.), cert. denied, 444 U.S. 990 (1979)). The court's holding was simply that "such a 'discovery bill' is not entitled to the status of a public document, as is, for example, an indictment" (Pet. App. A27 n.5).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1987

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